



US Army Corps
of Engineers
Seattle District

Special Public Notice

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CORPS OF ENGINEERS REGULATORY PROGRAM AND THE ENDANGERED SPECIES ACT

Since May 24, 1999, a number of species of salmon, steelhead, and trout inhabiting Northwest waters were listed in the Federal Register by the National Marine Fisheries Service and the U.S. Fish and Wildlife Service as endangered, threatened, or proposed species under the Endangered Species Act (ESA) of 1973. In addition, the habitat for most of these species has been designated as critical for their conservation. The purpose of this special public notice is to advise permit applicants and agents who apply for Department of the Army permits, as well as other interested parties, of the following:

- **Purpose of the Endangered Species Act**
- **How the ESA Listings and Critical Habitat Designations Affect the U.S. Army Corps of Engineers' (Corps) Regulatory Program and Permit Applicants**
- **Actions Being Taken by the Corps and Other Agencies to Expedite the Processing of Permit Applications**
- **Table of Current ESA Listings for Washington State Waters (see enclosure 1)**
- **Draft Guidance for Preparation of a Biological Evaluation or Biological Assessment (see enclosure 2)**
- **Project Conditions or Actions Determined to Have No Effect on Listed Species or Designated Critical Habitat for Fresh, Marine, and Estuarine Waters (see enclosure 3)**
- **Common Terms Used in the ESA (see enclosure 4)**

PURPOSE OF THE ESA OF 1973. The Endangered Species Act of 1973 was passed by the United States Congress for the purpose of providing a means whereby ecosystems and the endangered and threatened species that depend upon them may be conserved. It is the declared policy of Congress that all Federal departments and agencies shall seek to conserve endangered and threatened species and shall utilize their authorities in furtherance of the purposes of the ESA. Congress further declared that Federal agencies shall cooperate with

State and local agencies to resolve water resource issues in concert with conservation of endangered species (see 50 CFR, Part 402 and 33 CFR, Part 320.3(i)).

Section 7(a)(1) of the Act authorizes Federal agencies, in consultation with the Secretary of the Interior or Commerce, depending on the species involved, to utilize their resources in furtherance of the purposes of the Act by carrying out programs for the conservation of endangered and threatened species ("listed species") listed pursuant to Section 4 of the Act.

Section 7(a)(2) of the Act requires Federal agencies, in consultation with the Secretary, to ensure that any action authorized, funded, or carried out by such agency is not likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of habitat of such species which has been designated as critical ("critical habitat"). Authority to conduct consultations has been delegated by the Secretary of the Interior to the U.S. Fish and Wildlife Service (FWS) and by the Secretary of Commerce to the National Marine Fisheries Service (NMFS) (the Services).

HOW THE ESA LISTINGS AND CRITICAL HABITAT DESIGNATIONS AFFECT THE CORPS' REGULATORY PROGRAM AND APPLICANTS. Under the Corps' Federal permit program, permit applications must be reviewed for the potential impact on threatened and endangered species pursuant to Section 7 of the ESA. The Corps, through informal and formal consultation procedures with the Services, must evaluate information on the presence of listed species (including timing and life stages), habitat for such species and their prey sources, and other parameters. These consultation procedures are outlined in a *March 1998 Consultation Handbook* prepared by the Services. The information required for ESA evaluation must be prepared in the form of a Biological Evaluation (BE) or Biological Assessment (BA) which is utilized to assess project impacts to listed, and/or proposed species and designated and/or proposed critical habitat (see enclosure 2 of this special public notice for a list of required information that must be included in a BE/BA).

As required by the Corps' regulations at 33 CFR, Part 325.2(b)(5), ESA information is required for all pending and future permit applications for work affecting listed species before a permit decision can be made. Department of the Army permit regulations (33 CFR, 325.1(e)) authorize the District Engineer to obtain additional information from permit applicants deemed essential to making a public interest determination including environmental data such as the ESA information discussed herein. Before the Corps can make a permit decision on pending and future permit applications for work affecting listed species or critical habitat, a BE/BA must be prepared by a qualified biologist at the applicant's expense and be provided to the Corps so that the required ESA coordination can be conducted with the appropriate agencies. Many consulting firms in the area have qualified biologists on staff that can prepare a BE/BA. In the event that an applicant is unable to have a BE/BA prepared, they should contact the Corps' Seattle District, Regulatory Branch, at telephone (206) 764-3495 for assistance. Additional project information may also be requested before the permit application is processed.

Because the new ESA listings are all aquatic species, the Corps must now review the potential project impacts on listed species and designated critical habitat for the majority of the permit

applications received. In addition, the Corps must also review potential project impacts on species proposed for listing and proposed critical habitat. The additional ESA requirements have resulted in much longer permit processing times by the Corps' Seattle District, Regulatory Branch, than in the past and a large backlog of permit applications. The backlog as of March 16, 2000, was approximately 849 pending permit applications, a 103 percent increase since the May 24, 1999, ESA listings. As discussed below, the Corps is currently placing ESA emphasis on large groups of similar types of activities (programmatic BEs) to expedite the processing of some of the permit applications. We request your patience as we attempt to serve all permit applicants in as equitable a manner as possible.

The ESA procedures discussed above must be followed for all pending and future projects potentially affecting listed species or designated critical habitat, regardless of the size or potential impacts (adverse or beneficial) of a proposed project, whether a project is for new work or the repair or replacement of existing work (i.e., Nationwide Permit 3), or the type of permit process utilized by the Corps. The ESA procedures must be followed for all projects that could be authorized by nationwide permits, including those that did not previously require prior notification to the Corps. This requires submittal of appropriate notification (JARPA, pre-construction notification, or letter) to the Corps including project drawings and a BE/BA.

A BE/BA prepared for a specific project will have one of three conclusions as to its effect on listed species. These conclusions are as follows: (1) no effect; (2) may affect, not likely to adversely affect; or (3) may affect, likely to adversely affect. If the Corps determines that a project will have "no effect" on a listed species, consultation with the Services is not required and the Corps can proceed with the permit process and a permit decision. The Corps, in consultation with the Services, has determined that certain actions would have "no effect" on listed species. A description of actions determined to have "no effect" on listed species or designated critical habitat is provided in enclosure 3 of this public notice. This list will be updated, as needed. Where the conclusion in a BE/BA is a "may effect, not likely to adversely effect" or "may effect, likely to adversely effect," see discussion below.

ACTIONS BEING TAKEN BY THE CORPS AND OTHER AGENCIES TO EXPEDITE THE PROCESSING OF PERMIT APPLICATIONS. The Corps and the Services have been meeting on a bi-weekly basis ("batched consultation meetings") to discuss permit applications in which completed Draft BE/BAs have been prepared and the Corps has concluded that the proposed work "may affect, but is not likely to adversely affect" listed species or designated critical habitat. This is part of the "informal consultation" process. If the Services concur with a Corps determination that a project is "not likely to adversely affect" listed species or designated critical habitat, then the Corps can complete its permit process and permit decision. If either of the Services non-concurs with the Corps' determination, then formal consultation can be initiated as discussed below. In the informal consultation process, the Services will typically respond within 30 days of receipt of a BE/BA. If a permit is issued, special conditions may be added to the permit to protect listed species or designated critical habitat [33 CFR, Part 325.4(a)(1)].

When the Corps determines that a proposed project is "likely to adversely affect" listed species or designated critical habitat, "formal consultation" with one or both of the Services is initiated.

The formal consultation process is similar to the informal consultation process described above with the major exception of time allowances for resource agency review. In the formal consultation process, the agencies have up to 90 calendar days to prepare a draft Biological Opinion (BO) and have up to an additional 45 calendar days for the Corps' review and comment and for preparation of a final BO. Also, in formal consultation, the Services can require certain reasonable and prudent measures, terms, and conditions to be incorporated into the project if they believe the work can proceed with only incidental take that will not cause jeopardy to the continued existence of the species. However, if the Services believe no conditions could be placed upon the work to reduce impact to that level, they can then make a determination of "jeopardy." If this occurs, then the Corps must deny the permit request.

As a result of the large backlog of permit applications due to the new ESA requirements, the Corps is working closely with the Services to develop "programmatic" BE/BAs to expedite the ESA compliance process for the majority of permit applications. These programmatic permits will be prepared in two phases. The Phase I programmatic BEs will include a number of different types of minor construction activities considered "not likely to adversely affect" listed species or designated critical habitat. The Services must then provide a concurrence letter (with or without conservation measures) or non-concur and explain why they believe certain types of projects would adversely affect listed species.

The Phase II programmatic BAs will include a number of different activities considered "likely to adversely affect" listed species or designated critical habitat. This is intended to result in formal consultation as described above with a programmatic BO either stipulating measures to allow projects to proceed with appropriate permit conditions (reasonable and prudent measures to reduce potential impacts on listed species), or stipulating that one or more activities are likely to cause jeopardy in the areas of their intended use. Phase I of the programmatic consultations has been initiated and is expected to be finalized in the spring of 2000. Work on developing Phase II of the programmatic consultations will be initiated after the submittal of Phase 1 to the Services. Upon conclusion of these processes, a special public notice will be published announcing the results of each of these phases.

The Corps is also planning to delegate certain State or local agencies as non-Federal representatives to work one-on-one with the Services on informal consultation, as allowed by 50 CFR 402.08 of the ESA regulations. If an agency has a consultation protocol in place and has qualified biological staff dedicated to preparing BEs, then the Corps' Seattle District, Regulatory Branch, may consider such delegation. The Corps is currently working closely with King County and the Washington State Department of Transportation on ESA delegation authority.

In addition to the above actions, the Corps will be holding workshops in the summer of 2000 for consultants and other interested parties concerning the preparation of BE/BAs. A public notice will be issued announcing the proposed dates of these workshops.

Additional ESA information may be obtained from the following web sites:

<http://www.nwr.noaa.gov/1salmon/salmesa/index.html>

<http://www.fws.gov/r9endspp/endspp.html>

<http://www4.law.cornell.edu/uscode/16/ch35.html>

If you have any questions or need additional information on the ESA, please contact the Corps' Seattle District, Regulatory Branch, at telephone (206) 764-3495.

Threatened & Endangered Salmonid ESUs & DPSs Occurring in Washington State (by species)			<i>Critical Habitat</i>
<i>Evolutionary Sig. Unit (ESU)</i>	<i>Status</i>	<i>Fed. Register Date</i>	
Snake R. Spring/Summer Chinook	Final, Threatened	Apr. 22, 1992	Y
Snake R. Fall Chinook	Final, Threatened	Apr. 22, 1992	Y
<i>NOTE: On Mar. 9, 1998, proposal made to add areas to Snake R. fall chinook ESU</i>			
Lower Columbia R. Chinook	Final, Threatened	Mar. 24, 1999	Y
Upper Columbia R. Spring Chinook	Final, Endangered	Mar. 24, 1999	Y
Upper Willamette R. Chinook	Final, Threatened	Mar. 24, 1999	Y
Puget Sound Chinook	Final, Threatened	Mar. 24, 1999	Y
Snake R. Sockeye	Final, Endangered	Nov. 20, 1991	Y
Ozette Lake Sockeye	Final, Threatened	Mar. 25, 1999	Y
Snake R. Steelhead	Final, Threatened	Aug. 18, 1997	Y
Lower Columbia R. Steelhead	Final, Threatened	Mar. 19, 1998	Y
Middle Columbia R. Steelhead	Final, Threatened	Mar. 25, 1999	Y
Upper Columbia R. Steelhead	Final, Endangered	Aug. 18, 1997	Y
Upper Willamette Steelhead	Final, Threatened	Mar. 25, 1999	Y
Columbia River Chum	Final, Threatened	Mar. 25, 1999	Y
Hood Canal Summer Chum	Final, Threatened	Mar. 25, 1999	Y
Lower Columbia R./SW WA. Coho	Candidate	Jul. 25, 1995	N/A
Puget Sound/St. of Georgia Coho	Candidate	Jul. 25, 1995	N/A
Coastal/Puget Sound Bull Trout	Final, Threatened	Nov. 1, 1999	N
Columbia River Bull Trout	Final, Threatened	Jun. 20, 1998	N
SW Washington/Columbia River Coastal Cutthroat Trout	Proposed, Threatened	Apr. 5, 1999	N

Common Name : Scientific Name

Chinook salmon : *Oncorhynchus tshawytscha*
 Chum salmon : *Oncorhynchus ket*
 Coho salmon : *Oncorhynchus kisutch*
 Cutthroat Trout : *Oncorhynchus clarki clarki*

Sockeye salmon : *Oncorhynchus nerka*
 Steelhead : *Oncorhynchus mykiss*
 Bull Trout : *Salvelinus confluentus*

March 28, 2000

**DRAFT GUIDANCE for Preparation of a
Biological Evaluation (BE) or Biological Assessment (BA)**

This outline is to serve as a guide for the preparation of average Biological Evaluations/Biological Assessments (BEs/BAs) required for consultation under the Federal Endangered Species Act (ESA). The U.S. Fish and Wildlife Service and the National Marine Fisheries Service (the Services) administer the ESA, and all Federal action agencies must comply with it. Informal consultation (submission of a BE) is geared to demonstrate to the Services that impacts to listed species are insignificant and/or discountable, and if the Services agree they will write a concurrence letter. After formal consultation (submission of a BA), the Services will write a Biological Opinion (BO). Because the U.S. Army Corps of Engineers (Corps) may need to edit the BE/BA, and because much of the information from a BA is transposed into the Services' BO, we recommend that applicants provide us with a copy of the BE/BA on disk, if possible. While the Corps requires that applicants prepare BEs and BAs when at all possible, we encourage them or their consultants to first work with us on defining scope (note caveats in **bold** below).

I. Project Description

A. Project Location: City, county, State, township, range and section number. Provide vicinity maps.

B. Project Description: Describe the proposed project (briefly) and also methods and timing of construction to be employed in building the project (in detail). The idea is to identify actions that could affect the species or critical habitat in sufficient detail to allow an assessment of potential impacts. Consider actions such as vegetation removal, temporary or permanent elevations in noise level, channel modifications, hydrological or hydraulic alterations, etc. Include secondary impacts such as access roads, power lines etc. Provide project drawings. **(coordinate with the Corps PM on scope for this)**

C. Define the Action Area: The *action area* includes all areas at and around the project that would be affected directly or indirectly by the activity for which you are seeking a Corps permit, and not just the immediate area involved in the action. That is, it may consist of the footprint of the action or it may be larger. (*Direct* effects are those caused by the action and occur at the same time and place. *Indirect* effects are those caused by the proposed action and are later in time, but still are reasonably certain to occur.) The Corps' project manager will define the action area. **(coordinate with the Corps PM on this)**

II. Species and Habitat Information: Utilize information obtained from local biologists, pertinent literature, and other knowledgeable sources.

A. Species Information: Identify each affected species, including terrestrial species in the action area, and indicate whether or not there is designated critical habitat. Describe the species utilization within the action area, such as spawning, breeding, rearing, over-wintering, or travel corridor (migration). Discuss the species status in the action area and range-wide. Do not include detailed life histories. If *proposed* species and/or *proposed* critical habitat are also present they must be included in the BE/BA. Depending upon the scale of the potential impacts and the project's timeline you may elect to include *candidate* species. **(check with Corps in determining which species are to be included in BE/BA)**

B. Survey Results: When surveys are conducted, describe timing and method as well as the results. **(applicant conducts and describes surveys in BA, but Corps and the Services determine need; Corps coordinates with the Services for timing and protocol of surveys)**

C. Existing Environmental Conditions (Environmental Baseline): Include description of species habitat within the action area that may be directly or indirectly affected by the project. Describe plant communities, present land use, water quality, flow and current patterns, depth, substrate, slope, presence of prey species and/or prey species habitat, refugia, etc. Discuss whether the affected environment within the action area is degraded or not, and to what extent. The matrices mentioned in **III.A.** below may help you identify environmental parameters to discuss.

III. Effects of the Action:

A. Effects Analysis: Describe the direct and indirect and secondary effects of the action on the protected species and critical habitat within the action area. Consider the impact to both individuals and the population. Discuss the short-term, construction-related, impacts as well as the long-term and permanent effects. With regard to critical habitat, depending on the species, include habitat alterations to essential features such as spawning sites, loss of prey or food sources, water quality and quantity, riparian vegetation, loss of nesting or breeding habitat or cover. Address the timing of the disturbances relative to the life history of the species in the action area, particularly nesting or spawning periods. It behooves applicants to avoid or minimize impacts as much as possible. If the Services can concur with a Not Likely To Adversely Affect (NLAA) determination, this informal process is much quicker than a formal consultation. Key goals are to avoid causing a "take" of any listed species and to avoid causing a net degradation of the environmental baseline for those species.

For BEs, the analysis must include consideration of the *interrelated* and *interdependent* effects of the actions, and, additionally, for BAs must include consideration of *cumulative* effects. For the purposes of the Endangered Species Act, *cumulative* impacts are defined as all future State, local, or private activities that are reasonably certain to occur within the action area of the project under consultation. The analysis *does not* include future Federal activities unrelated to

the proposed action, as those impacts will be subject to separate consultation. *Interdependent* actions are those which have no independent utility apart from the action being considered. *Interrelated* actions are activities that are part of the larger action and depend on the larger action for their justification.

For fish species, discuss and/or provide a matrix for the various environmental pathways and indicators of effect. For further guidance on this, see the NMFS' "A Guide to Biological Assessments," revised March 23, 1999, and the FWS' "A Framework to Assist in Making Endangered Species Act Determinations of Effect for Individual or Grouped Actions at the Bull Trout Subpopulation Watershed Scale," February 1998.

B. Take Analysis: Assess and describe the potential for "incidental take." *Take* of a listed species means to harass, pursue, hunt, shoot, wound, trap, capture, or collect or attempt to engage in any such conduct. "Incidental take" may occur if a species may be harmed or harassed, etc., in the conduct of your work though you intend it no harm. *Harm* is further defined to include significant habitat modification or degradation that results in death or injury to listed species by significantly impairing behavioral patterns such as breeding, feeding, or sheltering. *Harass* is defined as actions that create the likelihood of injury to listed species to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering. Take applies only to individuals of a species, not to a species habitat or to designated critical habitat. The take prohibition does not extend to proposed or candidate species. If you do intend to "take" species for scientific study or other purpose as part of your action, you must apply to the appropriate Service for an ESA Section 10 permit.

Incidental take is the "take" of individuals of a listed species that results from, but is not the purpose of, carrying out an otherwise lawful activity. *Incidental take may be authorized through formal ESA Section 7 consultation.*

C. Conservation Measures: These are measures that would reduce or eliminate the adverse impacts of the proposed activity, particularly measures to be taken to reduce the likelihood of take. The measures need to be as specific as possible. Include a discussion of alternative construction methods and/or site locations considered. Alternatives may include alterations in the proposed activity such as timing restrictions or changes in project features or location which are intended to reduce impacts, or Best Management Practices you intend to implement.

D. Determination of Effect: Summary of impacts concluding with statement(s) of effect, by species. Even projects that are intended to benefit the species might have short-term adverse impacts and those must be addressed. Only the following determinations are valid for listed species: No Effect (NE); Not Likely to Adversely Affect (NLAA); Likely to Adversely Affect (LAA). The determination must consider impacts both to the species and critical habitat. Only one finding is made for the species and habitat, even if the project may have beneficial as well as detrimental affects (beneficial effects do not fall under the NE determination). Therefore, even projects that ultimately benefit the species may be found to have an adverse affect, due to

construction impacts. For proposed species, the finding is either Jeopardy or No Jeopardy. For critical habitat the finding is will or will not adversely modify or destroy critical habitat. **(The Corps makes the official agency determination. We generally do not consult or request concurrence from the Services for No Effect determinations, though there are exceptions. The Services will either concur or not with the other determination(s) and, if necessary, write a BO.)**

IV. References

V. Appendices (as needed): Such as condensed life histories, results of studies, results of water or sediment quality testing, drawings, photos, etc. The Corps will attach detailed life histories, if needed. (The Services and the Corps find it extremely helpful to have color photos of the existing project site included in the BE/BA, and this can serve to expedite our review of the environmental baseline and impacts.)

Note: In addition to the matrices mentioned in **III.A.** above, another source of guidance for NMFS-managed species is “The Habitat Approach: Implementation of Section 7 of the Endangered Species Act for Actions Affecting the Habitat of Pacific Anadromous Salmonids,” dated 26 August 1999. And another source (for all species, not just fish) is the FWS’ “Biological Assessment Preparation and Review” document, revised October 1999.

ADDITIONAL INFORMATION NECESSARY
FOR
ENDANGERED SPECIES ACT REVIEW

Under the Endangered Species Act, the Corps must evaluate the potential impacts of the proposal to listed and proposed species and their critical habitat before we can reach a permit decision. At a minimum, applicants should submit the following information to the Corps, or include it in biological evaluations or biological assessments prepared for threatened and endangered (T&E) fish species, to allow our assessment of potential impacts of the proposed work on T&E fish and their habitat. Additional information may also be required.

Marine/Estuarine Environment:

1. Description of substrate (bottom) to be dredged, filled, moved, and/or stockpiled onto, or built over (e.g., mud, sand, gravel, cobble, bedrock, other). Show substrate elevation(s) on drawings.
2. Distribution of eelgrass and macroalgae (large seaweed) in the action area, preferably determined by underwater survey.
3. Types of vegetation, and its distribution, along banks on the applicant's property, including any intertidal vascular plants (e.g., pickleweed).
4. Construction techniques
 - a. Excavation area, even if reestablished after construction.
 - b. Equipment to be used, such as backhoe or clamshell.
 - c. Describe method to access work area (e.g., barge mounted or route by land), including new access roads required.
 - d. Describe sediment control methods.
5. Photographs of the project site: Overall view from one end parallel to the shoreline and one or more photos of the substrate at low tide.
6. Forage fish spawning areas present? Salmonid rearing or migration areas present? (Can check with WDFW staff or StreamNet database.)
7. Description of proposed project elements that are in the action area but not in waters of the U.S., including removal of vegetation, creation of impervious surfaces; and proposed work timing. (Under ESA, the action area is "all areas to be affected directly or indirectly by the [work allowed by Federal permit] and not merely the immediate area involved in the action.")

Freshwater Environment:

1. Description of substrate (bottom) to be dredged, filled, moved, and/or stockpiled onto, or built over (e.g., mud, sand, gravel, cobble, bedrock, other). Show substrate elevation(s) on drawings.

2. Types of riparian, emergent, and submerged aquatic vegetation, and its distribution, in the action area.
3. Description of existing natural structure in the water (e.g., logs, rocks, overhanging bank, shallow slope bank), including number, size, etc.
4. Construction techniques
 - a. Excavation area, even if reestablished after construction.
 - b. Equipment to be used, such as backhoe or clamshell.
 - c. Describe method to access work area (e.g., barge mounted or route by land), including new access roads required.
 - d. Describe sediment control methods.
5. Salmonid or bull trout spawning areas or habitat present? (Can check with WDFW staff or StreamNet database.)
 - a. area of stream basin above project (square miles or kilometers).
 - b. type of stream (perennial, intermittent, or ephemeral).
6. Photographs of the project site parallel to shoreline showing the water and land.
7. Description of proposed project elements that are in the action area but not in waters of the U.S., including removal of vegetation, creation of impervious surfaces; and proposed work timing. (Under ESA, the action area is "all areas to be affected directly or indirectly by the [work allowed by Federal permit] and not merely the immediate area involved in the action.")

-WORKING DRAFT -

PROJECT CONDITIONS OR ACTIONS THAT QUALIFY AS
"NO EFFECT" ON LISTED OR PROPOSED T&E FISH
OR THEIR CRITICAL HABITAT IN WASHINGTON STATE
UNDER THE ENDANGERED SPECIES ACT*
(All Fresh Waters, *including* Columbia River & Baker Bay)

1. No listed fish or fish proposed for listing, or their forage base, or designated or proposed critical habitat occur in the waterbody where work is to occur, and work will not result in short- or long-term water quality or quantity impacts which may affect listed or proposed species or their forage base downstream of the project site. This condition applies to all fresh waters of the U.S., including wetlands, and includes all isolated waters or wetlands.
2. **For salmon and steelhead:** Work that occurs as part of a single and complete project that is 300 feet or more away from a water of the U.S. which may contain listed fish or fish proposed for listing, including intermittent streams and adjacent wetlands, and work will not result in short- or long-term water quality or quantity impacts which may affect listed or proposed species or their forage base downgradient of the project site. The 300-foot measurement is a horizontal measurement from the ordinary high water (OHW) mark (or top of the bank if an OHW mark is not observable), and does not take topography into account.

* Based on available literature [50 CFR Part 226, FR Vol. 65, No. 32], the Corps' Seattle District, Regulatory Branch, notes that a 300-foot riparian area should provide a high level of protection for these species and their critical habitat under the Endangered Species Act (ESA). This "No Effect" list is meant to cover those single and complete projects that meet the stated criteria. For projects that do not meet these criteria the applicant should contact the Corps for a case-by-case determination of effect under the ESA. Such projects may still qualify for a "No Effect" determination on an individual basis. This list does not represent any finding regarding the Clean Water Act, the Rivers and Harbors Act, nor any Federal law other than the ESA.

3. **For bull trout:** For streams and rivers: Work that occurs as part of a single and complete project that is beyond the edge of the channel migration zone (CMZ) of streams and rivers which may contain listed fish or fish proposed for listing (including intermittent streams) plus one site-potential tree height, or that is 300 feet or more away from a water of the U.S., whichever is the greater distance. For the purposes of this determination, site-potential tree height shall be defined as 130 feet for areas east of the Cascade crest and 200 feet for areas west of the Cascade crest. The 300-foot measurement is a horizontal measurement from the ordinary high water (OHW) mark (or the top of the bank if an OHW mark is not observable), and does not take topography into account. For lakes and other waters: Work that occurs as part of a single and complete project that is 300 feet or more away from a lake or other water of the U.S. which may contain listed fish or fish proposed for listing, including wetlands, and work will not result in short- or long-term water quality or quantity impacts which may affect listed or proposed species or their forage base downgradient of the project site. The 300-foot measurement is a horizontal measurement from the ordinary high water (OHW) mark (or the top of the bank if an OHW mark is not observable), and does not take topography into account.
4. Replacement of decking, rails, stringers, or other above-water parts on serviceable structures in navigable waters, provided that: any stain, paint, or preservatives to be applied on such components is completely dry/cured prior to installation, creosote and pentachlorophenol preserved wood will not be used, and no material shall enter the waterbody during the removal of decking, etc. [work typically allowed under Nationwide Permit 3]

(NOTE: The EPA/Corps jurisdiction under the Clean Water Act generally does not extend to: artificial lakes or ponds created by excavating and/or diking dry land to collect and retain water and which are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing; nor artificial reflecting or swimming pools or other small ornamental bodies of water created by excavating and/or diking dry land to retain water for primarily aesthetic reasons; nor to waterfilled depressions created in dry land incidental to construction activity and pits excavated in dry land for the purpose of obtaining fill, sand, or gravel unless and until the construction or excavation operation is abandoned and the resulting body of water meets the definition of waters of

the U.S. Additionally, construction or maintenance of farm or stock ponds is exempt from needing a Corps permit, as is construction of temporary sedimentation basins on a construction site which does not include placement of fill material into waters of the U.S.)

Definitions:

Adjacent. - Per Corps regulations, this term means "bordering, contiguous, or neighboring. Wetlands separate from other waters of the U.S. by manmade dikes or barriers, natural river berms, beach dunes, and the like are "adjacent wetlands"." [33 CFR 328.3(c)]

Channel migration zone (CMZ). – As used in this document, this term refers to "the lateral extent of likely movement along a stream reach with evidence of active stream channel movement over the past 100 years. Evidence of active movement can be provided from aerial photos or from specific channel and valley bottom characteristics." (Refer to the Washington State Forest Practices Board Manual for Emergency Rules, dated 3/2000)

Isolated waters or wetlands. – As used in this document, this term refers to those waterbodies, including wetlands, that have inlets but no outlets and do not otherwise drain to other waters.

Navigable waters. - This term includes "those waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce." [33 CFR 329.4]

Single and complete project. – Per Corps regulations, "all activities which the applicant plans to undertake which are reasonably related to the same project and for which a Department of the Army permit would be required should be included in the same permit application." [33 CFR 325.1(d)(2)] A "single and complete" project is defined at 33 CFR 330.2(i) as the total project proposed or accomplished by one owner/developer or partnership or other association of owners/developers.

Site-potential tree height. – The height of a tree that has attained the average maximum height possible given site conditions where it occurs. For this document, the FWS concurs with using the maximum height of trees in Forest Site Class I for each side of the Cascade crest. (Northwest Forest Plan)

T&E Species. - This refers to threatened and endangered species under the Federal Endangered Species Act.

Waters of the U.S. – This term includes all navigable waters, all interstate waters including wetlands, all other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, and the territorial seas (to 3 nautical miles offshore). [33 CFR 328.3(a)]

Wetlands. – Those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. [33 CFR 328.3(b)]. Wetlands generally include swamps, marshes, bogs, and similar areas.

- WORKING DRAFT -

PROJECT CONDITIONS OR ACTIONS THAT QUALIFY AS
"NO EFFECT" ON LISTED OR PROPOSED T&E FISH
OR THEIR CRITICAL HABITAT IN WASHINGTON STATE
UNDER THE ENDANGERED SPECIES ACT*
(All Marine/Estuarine Waters *except* Baker Bay)

1. No listed fish or fish proposed for listing, or their forage base, or designated or proposed critical habitat occur in the marine or estuarine waterbody where work is to occur; **-or-**
2. Work that occurs as part of a single and complete project and that is 300 feet or more upland from the shoreline (generally the line of Mean Higher High Water (MHHW) or ordinary high water (OHW) line), of any marine or estuarine waterbody, except the mouth of the Columbia River (Baker Bay), including any estuarine wetlands with or without tidal channels, and work will not result in short- or long-term water quality or quantity impacts which may affect listed or proposed species or their forage base downgradient of the project site. The 300-foot measurement is a horizontal measurement from the MHHW or OHW line, or from the upland edge of the estuarine wetland, and does not take topography into account.
3. Placement of navigation aids and regulatory markers on existing structures, and buoys for such purposes, in navigable waters, provided that: the buoys are not located over or

* Based on available literature [50 CFR Part 226, FR Vol. 65, No. 32], the Corps' Seattle District, Regulatory Branch, notes that a 300-foot-riparian area should provide a high level of protection for these species and their critical habitat under the Endangered Species Act (ESA). This "No Effect" list is meant to cover those single and complete projects that meet the stated criteria. For projects that do not meet these criteria the applicant should contact the Corps for a case-by-case determination of effect under the ESA. Such projects may still qualify for a "No Effect" determination on an individual basis. This list does not represent any finding regarding the Clean Water Act, the Rivers and Harbors Act, nor any Federal law other than the ESA.

adjacent to vegetated shallows or spawning areas for forage species and are anchored securely. [from Nationwide Permit (NWP) 1]

4. Replacement of decking, rails, stringers, or other above-water parts of serviceable structures in navigable waters, provided that: any stain, paint, or preservatives to be applied on such components is completely dried/cured prior to installation, creosote and pentachlorophenol preserved wood will not be used, and no material shall enter the waterbody during removal of decking, etc. [work typically allowed under NWP 3]

Definitions:

MHHW - This term refers to a "high tide" elevation in tidal waters (ocean waters, bays, estuaries, and certain rivers) on the West Coast of the U.S. It is based on averaging the elevations for the *higher* of each day's two high tides. Hence the term Mean *Higher* High Water or MHHW. [33 CFR 329.12(A)(2)] When the precise location of the elevation line is necessary, it can be ascertained by survey or by reviewing tide tables. For more information about tidal data in the State of Washington, see the Corps' Seattle District website:

<http://www.nws.usace.army.mil/hh/tides/tides.htm>

Navigable Waters - This term includes "those waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce." [33 CFR 329.4]

Single and complete project – Per Corps regulations, "all activities which the applicant plans to undertake which are reasonably related to the same project and for which a Department of the Army permit would be required should be included in the same permit application." [33 CFR 325.1(d)(2)] A "single and complete project" is defined at 33 CFR 330.2(i) as the total project proposed or accomplished by one owner/developer or partnership or other association of owners/developers.

T&E Species - This refers to threatened and endangered species under the Federal Endangered Species Act.

Wetlands – Those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. [33 CFR 328.3(b)]. Wetlands generally include swamps, marshes, bogs, and similar areas.

COMMON TERMS USED IN THE ENDANGERED SPECIES ACT (ESA). The following definitions are provided to familiarize readers with important terms used in the ESA.

- **Action Area.** All areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action.
- **Biological Evaluation/Assessment (BE/BA).** Information prepared by, or under the direction of, a Federal agency to determine whether a proposed action is likely to: (1) adversely affect listed species or designated critical habitat; (2) jeopardize the continued existence of species that are proposed for listing; or (3) adversely modify proposed critical habitat. The outcome of a biological evaluation/assessment determines whether formal consultation or a conference is necessary. An assessment is called a BE if the determination is “no effect” or “not likely to adversely affect.” It is called a BA if the determination is “likely to adversely affect.”
- **Biological Opinion (BO).** Document which includes: (1) the opinion of the U.S. Fish and Wildlife Service (FWS) and by the Secretary of Commerce to the National Marine Fisheries Service (NMFS) (the Services) as to whether or not a Federal action is likely to jeopardize the continued existence of listed species; or result in the destruction or adverse modification of designated critical habitat; (2) a summary of the information on which the opinion is based; and (3) a detailed discussion of the effects of the action on listed species or designated critical habitat.
- **Candidate Species.** The term “candidate species” means any species considered for possible addition to the List of Endangered and Threatened Species. The NMFS considers candidate species imminent for listing.
- **Conservation Measures.** These are actions to benefit or promote the recovery of listed species that are included by the Federal agency as an integral part of the proposed action. These actions will be taken by the Federal agency or applicant, and serve to minimize or compensate for, project effects on the species under review. These may include actions taken prior to the initiation of consultation, or actions which the Federal agency or applicant have committed to complete in a BA or similar document.
- **Critical Habitat.** The term “critical habitat” for a threatened or endangered species means:
 - (1) the specific areas within the geographical area occupied by the species... on which are found those physical or biological features essential to the conservation of the species and which may require special management considerations or protection; and

(2) specific areas outside the geographical area occupied by the species... upon a determination by the Secretary that such areas are essential for the conservation of the species.

- **Destruction or Adverse Modification of Critical Habitat.** A direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species.
- **Effects of the Action.** The direct and indirect effects of an action on the species or critical habitat, together with the effects of other activities that are interrelated or interdependent with that action. These effects are considered along with the environmental baseline and the predicted cumulative effects to determine the overall effects to the species for purposes of preparing a biological opinion on the proposed action.
- **Endangered Species.** The term “endangered species” means any species which is in danger of extinction throughout all or a significant portion of its range.
- **Environmental Baseline.** The past and present impacts of all Federal, State, or private actions and other human activities in an action area; the anticipated impacts of all proposed Federal projects in an action area that have already undergone formal or early Section 7 consultation; and the impact of State or private actions that are contemporaneous with the consultation process.
- **Formal Consultation.** A process between the Services and a Federal agency or applicant that is initiated when a proposed Federal action is likely to adversely affect listed species or modify designated critical habitat. It begins with a Federal agency’s or the Services written request and submittal of a complete initiation package. The process concludes with the issuance of a BO and incidental take statement by either of the Services.
- **Incidental Take.** The take of listed fish or wildlife species that results from, but is not the purpose of, carrying out an otherwise lawful activity conducted by a Federal agency or applicant.
- **Indirect Effects.** Those effects that are caused by or will result from the proposed action and are later in time, but are still reasonably certain to occur.
- **Informal Consultation.** If a proposed Federal action may affect, but is not likely to adversely affect, listed species or designated critical habitat, the informal consultation process is required. This process allows the Federal agency to utilize the Services’ expertise to evaluate the agency’s assessment of potential

effects or to suggest possible modifications to the proposed action which could avoid potentially adverse effects. It is also an optional process, prior to formal consultation, that includes all discussions and correspondence between the Services and a Federal agency or designated non-Federal representative to determine whether a proposed Federal action may affect listed species or critical habitat.

- **Interdependent Effects.** Effects from activities which have no independent utility apart from the action being considered.
- **Interrelated Effects.** Effects from activities that are part of a larger action and depend on the larger action for their justification.
- **Jeopardize.** The determination given by the NMFS or FWS in their BO when an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species.
- **Likely to Adversely Affect.** The appropriate conclusion in a BA if any adverse effect to listed species may occur as a direct or indirect result of the proposed action or its interdependent or interrelated actions, and the effect is not: discountable, insignificant, or beneficial (see definition of “not likely to adversely affect” below).
- **No Effect.** The appropriate conclusion when the action agency determines its proposed action will not affect a listed species or designated critical habitat.
- **Not Likely to Adversely Affect.** The appropriate conclusion in a BE when effects on listed species are expected to be discountable, insignificant, or completely beneficial.
- **Proposed Species.** Any species of fish, wildlife or plant that is proposed in the Federal Register to be listed under Section 4 of the Act.
- **Reasonable Prudent Measures.** Actions the Director believes necessary or appropriate.
- **Take.** To harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect or attempt to engage in any such conduct.
- **Threatened Species.** The term “threatened species” means any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.